No. 89-7260

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

WILLIAM J. BURNS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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CONSTITUTIONAL PROVISIONS

CASES

STATUTES

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Respondent, inter alia, urges that this case is not worthy of review because there is only a direct split between two circuits, and the decision below is the correct view of the law. Respondent also perfunctorily claims that despite the fact that the court below decided the issue raised here on its merits, certiorari should be denied because the issue was not preserved for review.

This reply memorandum disputes respondent's attempt to minimize the seriousness of the conflict among the courts of appeals. It identifies additional circuits which, subsequent to the filing of the Petition for Certiorari, have now joined the conflict. In petitioner's view there are now six circuits, in addition to the District of Columbia Circuit, which have addressed this issue. Three are in direct conflict with the decision below. The conflict concerns fundamental statutory and Fifth Amendment due process issues which should now be resolved by this Court.

The reply also addresses the waiver claim which was ignored by the court below and is, in any event, without merit.

1. Respondent claims in its Brief in Opposition at 8 that the decision below is in direct conflict only with the Ninth Circuit's holding in United States v. Nuno-Para, 877 F.2d 1409 (9th Cir. 1989) on the issue of required notice and opportunity to be heard prior to upward departure from the federal Sentencing Guidelines.[1]

The conflict is larger and sharper than the respondent acknowledges. Three more circuits - the First, Sixth and Seventh - have now addressed this issue and at least one of these decisions is squarely in conflict with the decision below. United States v. Anders, 899 F.2d 570 (6th Cir. 1990) (specifically adopting the Ninth Circuit's notice requirements in

[1] The Ninth Circuit has reaffirmed its reading of the notice required by Fed. R. Crim. P. 32(a) ("Rule 32") and 18 U.S.C. §3553(d)(1988). United States v. Ramirez Acosta, 895 F.2d 597 (9th Cir. 1990); United States v. Hedberg, No. 89-30114 slip op. (9th Cir. May 9, 1990)(LEXIS Genfed, U.S. App. 7392).

Nuno-Para); United States v. Williams, No.88-2528 slip op. (7th Cir. May 4, 1990)(to be reported at 901 F.2d 1394)(LEXIS Genfed, U.S. App. 7215) (citing approvingly to the notice requirements of Nuno-Para); See United States v. Hernandez, 896 F.2d 642 (1st Cir. 1990) (not directly deciding the issue of notice but acknowledging the holdings of Nuno-Para and other cases).

2. Respondent's attempt to exclude the Fifth and Second Circuits from the conflict is not persuasive. The court below itself recognized that it was rejecting the proposition that any notice was needed before sentence was imposed and expressly noted its disagreement with these circuits on this point. (Pet. App. A at 6). The Second Circuit is flatly in conflict with the decision below. United States v. Palta, 880 F.2d 636, 640 (2d Cir. 1989) ("[a]dequate notice and an opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness").

Respondent's claim that there is no conflict with the Fifth Circuit is based on a conclusion that the Fifth Circuit does not require notice if the departure is based on facts contained in the presentence report. (Brief in Opposition at 5, 8). Petitioner would agree only that the Fifth Circuit cases are not entirely clear on this point. See United States v. Otero, 868 F.2d 1412, 1415 (5th Cir. 1989) and United States v. Michael, 894 F.2d 1457 (5th Cir. 1990). Regardless, reliance by the respondent and court below on the conclusion that notice is not

required if the factual basis for the departure can be gleaned from the presentence report, (Pet. App. A at 6),[2] does not weaken the depth of the conflict presented here. This type of distinction is itself the focus of a clear conflict among the circuits. Nuno-Para, 877 F.2d at 1415 ("[the notice] requirement is not satisfied by the fact that the relevant information is present within the presentence report. Rather, such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity for comment") (footnote and citations omitted); Anders, 899 F.2d at 570 ("[t]he presentence report or the court must inform the defendant of factors that may constitute grounds for departure from the Guidelines. This requirement is not satisfied, however, by merely including the relevant information in the presentence report. Instead 'such information either must be identified as a basis for departure in the presentence report, or, the court must advise the defendant that it is considering departure based on a particular factor and allow defense counsel an opportunity to comment'")(quoting Nuno-Para, 877 F.2d at 1415)(emphasis in original)(citations omitted).

The opinions cited reflect the judicial view that adequate notice of departure from the Sentencing Guidelines is a matter of

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[2] Whether petitioner had any notice from the presentence report that his conduct disrupted a governmental function is a very questionable proposition. See (Pet. at 13-14).

fundamental fairness. Contrary to the respondent's contention, (Brief in Opposition at 6 n. 2), neither the Due Process Clause, Rule 32, nor the Guidelines themselves are satisfied when only a presentence report is available to the defendant that does not at least highlight any factor as possible grounds for departure.[3] See Nuno-Para, 877 F.2d at 1415 (acknowledging due process implications of notice question while deciding on basis of Rule 32 alone); Anders, 899 F.2d at 575-76 (same).

Both the respondent's position and the opinion below ignore the fairness and accuracy requirements of the Sentencing Guidelines and Rule 32. While the court below acknowledged that "the defendant could have made a stronger argument for himself had he known that the judge was intending to depart from the Guidelines and the reasons for such departure . . . ," it went on to say that it did not see "any language in Rule 32 or the Guidelines requiring the judge to tell the defendant he should make the best case." (Pet. App. A at 6). However, "[a]dequate notice and the opportunity to contest an upward departure from the guidelines are indispensable to sentencing uniformity and fairness". Palta, 880 F.2d at 640. The court below recognized that presentencing notice provides the defendant some adversarial advantage by helping him to "make his best case," yet rejected the conclusion reached elsewhere that such notice serves

[3] See Pet. at 12-13 (discussing impairment of petitioner's ability to contest factual grounds for departure on appeal, due to lack of departure notice and resultant inability to get his version properly into record).

to help ensure "the sentencing process is accurate and fair." United States Sentencing Commission, Guidelines Manual ("U.S.S.G.") §6A1.3 commentary.

This petitioner could not have been aware of the factors used by the sentencing judge to opt for an upward departure from the Guidelines. The presentence report stated that no circumstance of Burns' crimes might warrant departure from Sentencing Guidelines, nor did the probation officer recommend any departure. (Pet. App. C at 13). The government and defendant had entered into a plea agreement which contemplated a sentence within the Guideline range. (Pet. App. C at 15). Thus, nothing could have put the defendant or his attorney on notice that the judge was considering certain factors as a basis for an upward departure.[4]

Respondent's position on this question requires defense counsel to attempt to second-guess a sentencing judge's thought process by arguing against every possible interpretation of the facts which might yield an upward departure. Not only is this possibility grossly inefficient, it puts counsel in the position of suggesting to the court fresh interpretations which might be harmful to the defendant's position. This would violate the defense lawyer's duty to his client, and effectively shift part

[4] The judge apparently had concerns some time before the hearing began, since the sentencing hearing was adjourned at 3:40 P.M. on October 14, 1988, (T.R. Sentencing at 32) and the five page typewritten memorandum order was filed with the clerk that same day, indicating that the written memorandum had probably already been prepared. Yet, at no time until sentence was passed did the judge reveal her concerns.

of the government's burden to the opposing party. Such an approach cannot promote fairness and accuracy in the sentencing process, which are at the heart of the Sentencing Guidelines. Therefore, the Court should review this question and reverse the decision below.

3. However this case is viewed, there is a conflict between the circuits which if allowed to persist will undermine the underlying rationale for the Sentencing Guidelines - the desire for consistency and fairness in the federal sentencing procedure. It is evident from the increasing number of cases and the rapidly expanding number of circuits involved, that the requisite notice attendant to a sentencing upward departure is an important and recurring matter. Even if this Court concludes that Rule 32 and 18 U.S.C. §3553(d) only entitle a defendant to notice immediately prior to imposition of sentence, that is more than is required by the District of Columbia Circuit. Fairness in the context of what process is due in a federal sentencing procedure must be the same in the District of Columbia, Los Angeles and Chicago. Because of the conflict that currently exists between circuits, this can only be accomplished by this Court granting certiorari in the case below and making clear whether and when a defendant has a right to notice and an opportunity to respond when there is an upward departure from the federal Sentencing Guidelines.

4. Respondent seeks to avert review by this Court by perfunctorily claiming that the petitioner waived his right to appeal the district court's failure to give notice of its upward departure. (Brief in Opposition at 7). This waiver claim is unwarranted.

First, even assuming that there was a waiver of the notice claim, it became irrelevant when the court below decided the issue on the merits with no discussion of waiver. (Pet. App. A at 1-7). The court wrote a precedent setting opinion which established a notice rule in the District of Columbia Circuit which is now in direct opposition to decisions in at least three circuits (Second, Sixth and Ninth) and seemingly inconsistent with three others (First, Fifth and Seventh). By creating a substantial conflict on an issue of both constitutional and statutory significance in the federal system, the court below rendered moot any claim that the court was not obliged to address the issue on the merits.[5]

Moreover the notice issue was preserved for review. Respondent mistakenly relies on United States v. Velasquez, 868 F.2d 714 (5th Cir. 1989), as its sole support for the waiver

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[5] Even if the court below found that a waiver had occurred, it could have reviewed the merits of petitioner's sentence by concluding "that denying review will violate a defendant's substantial rights." United States v. Justice, 877 F.2d 664, 670 (8th Cir.) reh'g and reh'g en banc denied (8th Cir. Aug. 7, 1989). See also United States v. White, No. 89-1598 slip op. at 27-28 (7th Cir. May 24, 1990) (discussing "plain error" doctrine in sentencing appeal). Alternately, in one circuit's view the court can review waived sentencing issues "because they involve matters of law under a novel and potentially complex scheme . . . ." United States v. Taylor, 868 F.2d 125, 126 (5th Cir. 1989).

argument. (Brief in Opposition at 7). Velasquez claimed on appeal that he was not given adequate opportunity to dispute the presentence report during his sentencing hearing. Id. at 715. The Fifth Circuit held that the claim was waived because each of the lawyers representing Velasquez was given an opportunity to be heard and one was even asked whether "he had anything more to say." Id. With no indication that counsel was cut off in any way and in the absence of an objection, the court refused to consider the procedural issue. Id. If Velasquez stands for anything it is simply that one cannot claim denial of a fair opportunity to be heard when the court expressly asked for comments and received them.

The Velasquez type of affirmative express waiver of a right to be heard is irrelevant here. The petitioner did not become aware of any grounds for objection until sentence was imposed. (Pet. App. C at 27-32). The district court gave no advance warning of the grounds for departure, nor did she invite discussion of departure after sentence was imposed.[6] No Court of

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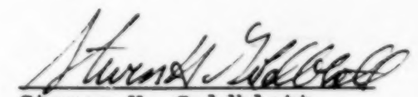
[6] Other circuits have recognized the rule that a requirement to object is only present if the sentencing judge affirmatively provides an opportunity for objections during the hearing. E.g., United States v. Jones, 899 F.2d 1097, 1102-03 (11th Cir. 1990) (because "new causes for objection, which the parties could not reasonably have anticipated, may arise during the hearing or during the imposition of sentence[,] . . . [whenever] the district court has not elicited fully articulated objections following the imposition of sentence, [the Court of Appeals] will vacate the sentence and remand"); Williams, No. 88-2528 slip op. at 19 ("[b]oth before and after imposing sentence, the district judge gave defense counsel opportunities to object. . . . This procedure complied with the requirements of Rule 32 and §6A1.3"); See also United States v. Lemire, 720 F.2d 1327, 1352 n. 37 (D.C. Cir. 1983) (finding waiver where

Appeals ruling on adequacy of departure notice, including the court below, has held an objection necessary to preserve this type of notice issue. Moreover, because a lack of notice is not apparent until the sentencing judge actually imposes an upwardly departing sentence, the issue is fairly subsumed within the scope of review under 18 U.S.C. §3742(a)(1988), which provides a statutory right to appeal the validity of departure without the need for an objection in the trial court.

CONCLUSION

Based on the foregoing reasons, as well as the reasons stated in the Petition for Certiorari, the petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari and review the decision of the District of Columbia Circuit in this case.

Respectfully submitted,



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defendant clearly knew restitution would be part of sentence to be imposed, yet failed to object during hearing).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one copy of the foregoing Reply Memorandum for Petitioner was mailed, postage pre-paid, to: John G. Roberts, Jr., Acting Solicitor General of the United States, Tenth and Constitution Avenue, Washington, D.C. 20530, on this 20th day of June 1990.

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